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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IN RE: HIGH-TECH EMPLOYEE
ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:

ALL ACTIONS

Master Docket No. 11-CV-2509-LHK

**JOINT CASE MANAGEMENT
CONFERENCE STATEMENT**

Date: December 18, 2013
Time: 2:00 p.m.
Courtroom: 8, 4th Floor
Judge: The Honorable Lucy H. Koh

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3 The parties submit this joint statement for the December 18, 2013 Case Management
4 Conference.

5 **I. Notice to the Class**

6 As Plaintiffs explained in their December 11, 2013 letter to the Court, Class Counsel and
7 counsel for the settling Defendants have reached agreement on a proposed revised form of notice
8 to advise class members of both the partial settlements with the three settling Defendants and the
9 continuing litigation on behalf of a certified class against the four non-settling Defendants.
10 Plaintiffs provided this proposed draft notice to the Non-Settling Defendants on December 5,
11 2013, for their review and input and anticipate receiving their comments shortly.

12 Because notice will be delayed while the parties discuss the form and content of the
13 revised notice, and then the Court considers whether to approve that notice, Plaintiffs respectfully
14 seek a brief continuance of the December 16, 2013 deadline for mailed notice, and ask for it to be
15 re-set for a date ten (10) days after the Court's approval of a revised notice.

16 **Plaintiffs' Statement**

17 Non-settling Defendants claim that the revised notice should be simplified and changed.
18 However, the proposed revised notice presents few and necessary changes adding additional
19 information to the notice the Court previously reviewed and approved. Plaintiffs do not believe it
20 is necessary to revisit notice language the Court already commented on and approved, where the
21 Court's approved language still pertains. Most of the changes Plaintiffs have proposed in the
22 revised notice involve re-organizing the Court's previously-approved language in order to
23 sequence the approved text regarding the partial settlements to follow more logically after the
24 new text regarding litigation class certification. For the Court's reference, Plaintiffs have
25 attached hereto a copy of the revised notice, along with a redline showing the proposed changes
26 from the notice the Court approved on October 30, 2013. Additionally, Plaintiffs oppose an opt-
27 out form as proposed by Non-Settling Defendants below. The Court previously addressed this
28

1 concept during the hearing on Plaintiffs' Unopposed Motion for Preliminary Settlement Approval
2 on October 21, 2013, where Plaintiffs argued that such form would only serve to confuse Class
3 members. *See* Dkt. No. 539 (Transcript of October 21, 2013 Preliminary Approval Hearing) at
4 52:16-56:11. Finally, Plaintiffs do not understand Non-Settling Defendants' concern about the
5 notice opt-out period being completed by the summary judgment date, as the current schedule
6 contemplates that the opt out period will run on March 19, 2014, before the March 27, 2014
7 hearing on summary judgment.

8 **Non-Settling Defendants' Statement**

9 The Non-Settling Defendants are reviewing the current draft and expect to have comments
10 on the form and content of the notice and of the related opt-out form. Although their review is
11 ongoing and they have not yet been able to coordinate all of the comments from these four
12 parties, they are working on doing so. By way of example, the revised notice as proposed by
13 Plaintiffs is quite complicated, largely due to the number of distinct topics it needs to cover. It
14 would seem possible that with some reorganization the notice can be made more clear and
15 perhaps can be simplified. The Non-Settling Defendants are working on revising the draft to
16 accomplish these goals and will meet and confer with Plaintiffs' counsel to discuss their
17 suggestions. The Non-Settling Defendants, who did not have the opportunity to comment upon
18 the notice proposed by the Plaintiffs and the Settling Defendants, also believe that there should be
19 a simple opt-out form that accompanies the notice and that this opt-out form also should be
20 available on on-line. The cited pages from the transcript of the October 21, 2013 hearing show
21 that the issue of whether a separate opt-out form is appropriate was never squarely presented to,
22 much less decided by, the Court. The separate opt-out form procedure is consistent with the
23 recommendations of the Federal Judicial Center's Manual on Complex Litigation. *See* Manual
24 Complex Litig., 4th ed. § 21.311; *see also* 2 Newberg on Class Actions, § 8:12 ("the Manual also
25 suggests including a clearly written opt-out form (easily distinguished from any proof of claim
26 forms if the notice also covers a class action settlement)"). There is no risk of confusion posed by
27 an opt-out form specific to the Non-Settling Defendants because the class members' options are
28

1 binary: either remain in the class or opt-out.

2 In addition, the Non-Settling Defendants note that the notice and opt-out process must be
3 completed before the Court rules on any merits-based motions, including motions for summary
4 judgment. Under Rule 23, “notice must be sent before a judgment has been granted.”

5 *Schwarzschild v. Tse*, 69 F.3d 293, 295 (9th Cir. 1995); *see also Postow v. OBA Fed. Sav. & Loan*
6 *Ass’n*, 627 F.2d 1370, 1381-82 (D.C. Cir. 1980); *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 759-
7 60 (3d Cir. 1974). This rule is necessary to prevent “one-way intervention,” where a potential
8 class member could wait and see how the court resolved the merits of the case before deciding
9 whether to be bound by the court’s judgment. “Such intervention is termed ‘one way’ because
10 the plaintiff would not otherwise be bound by an adjudication in favor of the defendant.”
11 *Schwarzschild*, 69 F.3d at 295 (citing *Katz*, 496 F.2d at 759)). The Ninth Circuit has made clear
12 that a notice and opt-out process that permits one-way intervention is forbidden. *See id.* at 295-
13 96.

14 **II. Expert Discovery**

15 The parties have stayed on schedule with respect to their merits expert reports and related
16 expert discovery. Plaintiffs served their initial merits expert reports on October 28, 2013;
17 Defendants Adobe, Apple, Google, and Intel served their merits expert reports on November 25,
18 2013; and Plaintiffs’ expert rebuttal reports will be served on December 11, 2013. Plaintiffs and
19 Defendants have deposed each other’s merits experts based on the reports served to date. The
20 expert discovery cutoff is December 23, 2013.

21 **Plaintiffs’ Statement**

22 Defendants’ expert Dr. David Lewin was deposed on December 11, 2013. During his
23 deposition, Dr. Lewin refused to answer two questions: (1) whether he has an equity interest in
24 his consulting firm; and (2) whether his compensation is based in any way on income his
25 consulting firm receives from the matters he works on.¹ This information is discoverable
26

27 ¹ Defense counsel permitted Dr. Lewin to answer these questions, but he refused to answer them.

1 pursuant to Federal Rule of Civil Procedure 26(b)(4)(C). Plaintiffs respectfully request that the
2 Court order Dr. Lewin to answer these questions, either by re-appearing for a deposition or in
3 writing.

4 **Non-Settling Defendants' Statement**

5 As Plaintiffs correctly note, Adobe did not instruct Dr. Lewin not to answer any of these
6 questions. Dr. Lewin refused to answer at the instruction of the General Counsel of his employer,
7 the Berkeley Research Group, whose position is that the expert report provides the information
8 required by Rule 26(a)(2)(B)(vi) ("a statement of the compensation to be paid for the study and
9 testimony in the case") and that the information requested at the deposition is beyond what Rule
10 26 requires. Adobe offered on the record to facilitate discussions with the Berkeley Research
11 Group's General Counsel to provide the information that plaintiffs have sought, and remains
12 willing to do so.

13 **III. Mediation**

14 The parties held a mediation session with David A. Rotman on November 19, 2013.

15 On February 17, 2014, the parties will meet for a mediation facilitated by the Honorable
16 Layn Phillips (Ret.).

1 Dated: December 11, 2013 LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP

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